FILED
U.S. BANKRUPTCY COURT
2012 APR -3 PM 2:52
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	**CASE NUMBER 12-40229**
JAMES L. BROWN,	*	**CHAPTER 7**
Debtor.	*	**HONORABLE KAY WOODS**

****

ORDER (i) DENYING MOTION FOR WAIVER; AND
(ii) DISMISSING BANKRUPTCY CASE

****

This cause is before the Court on Motion for Waiver of Time Limit for Consumer Credit Counseling Course due to Exigent Circumstances ("Motion") (Doc. # 16) filed by Debtor James L. Brown on March 20, 2012. The Debtor requests the Court to waive the requirement that the credit counseling mandated by 11 U.S.C. § 109(h) ("Credit Counseling") be completed prior to filing the bankruptcy petition. No party in interest has opposed the Motion or moved to dismiss the Debtor's case.

By way of background, the Debtor filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code, on February 8, 2012 ("Petition Date"). On February 23, 2012, the Court issued Order to Appear and Show Cause (Doc. # 10), which ordered the Debtor and his counsel, David J. Gerchak, Esq., to appear on March 8, 2012 ("Hearing"), and show cause why the Debtor's case should not be dismissed based upon the Debtor's failure to file a certificate of completion of Credit Counseling. On March 1, 2012, the Debtor filed Certificate of Counseling (Doc. # 12), which certified that the Debtor completed Credit Counseling on

February 13, 2012 — *i.e.*, five days after the Petition Date. Attached to the Certificate of Counseling was a letter from Access Counseling, Inc., an approved provider of Credit Counseling, which stated that the Debtor completed the "main Internet portion" of Credit Counseling on February 7, 2012, but the Debtor "was not aware of" the "required 10-15 minute follow-up session" and did not complete the follow-up session until February 13, 2012. (Cert. of Counseling at 2.) The letter further stated that the "mandated follow-up session can be via telephone, Web Chat, or e-Mail." (*Id.*)

The Court held the Hearing, at which Mr. Gerchak appeared on behalf of the Debtor. The Court informed Mr. Gerchak that, although the Certificate of Counseling had been filed, the Debtor had not completed Credit Counseling prior to filing his petition. As a consequence, the Court ordered the Debtor to file a motion explaining whether he had properly completed Credit Counseling.

In the Motion, the Debtor asserts that exigent circumstances exist, pursuant to § 109(h)(3)(A), to waive the requirement that the Debtor complete Credit Counseling pre-petition. The Debtor contends that he believed he had completed Credit Counseling on February 7, 2012, which was the day prior to the Petition Date. Mr. Gerchak states that, prior to filing the Debtor's petition, he received an email from Access Counseling, Inc., which he mistakenly believed to be the Certificate of Counseling. However, upon opening this email (presumably after the petition was filed), Mr. Gerchak "discovered that it was not the final [Certificate of Counseling], but a final

worksheet that had to be completed over the phone by the debtor." (Mot. at 1.) The Debtor subsequently completed Credit Counseling on February 13, 2012.

Section 109(h) states, in pertinent part:

> (1) [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period ending on the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.
>
> * * *
>
> (3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—
>
> (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
>
> (ii) states that <u>the debtor requested credit counseling services</u> from an approved nonprofit budget and credit counseling agency, <u>but was unable to obtain the services referred to in paragraph (1) during the 7-day period beginning on the date on which the debtor made that request</u>; and
>
> (iii) is satisfactory to the court.

11 U.S.C. § 109(h) (West 2012) (emphasis added).

Facts nearly identical to those before this Court were addressed by the Bankruptcy Appellate Panel for the Sixth Circuit ("B.A.P.") in *In re Ingram*, 460 B.R. 904 (B.A.P. 6th Cir. 2011). In *Ingram*, the debtor completed the online portion of Credit Counseling prior to filing his bankruptcy petition, but did not complete the telephone component of Credit Counseling until the day

after the petition was filed. The United States Trustee filed a motion to dismiss the debtor's case based upon the debtor's failure to complete Credit Counseling pre-petition. The Bankruptcy Court for the Northern District of Ohio held a hearing on the motion to dismiss, at which it dismissed the debtor's case and stated on the record:

> "I'm going to grant the Trustee's motion to dismiss. That doesn't mean that the case can't be refiled or a new case can't be filed again. But the language of 109(h) is straightforward and the provision that says that the service can be either by telephone or by internet, it doesn't mean that if the service is some of both – it could be all on the phone, it could be all in person and it could be all on the internet, but you need to complete whatever the briefing session is. So if the briefing session that you signed up for says that you need to do two parts, then you have to do both parts and finish both parts before the case is filed in order to qualify, unless you fall within the exigent circumstances exception. . . .
>
> I read [§ 109(h)] as literally and I've tried to apply it uniformly. And in your circumstances, Mr. Ingram, you're simply not eligible under 109(h)."

Id. at 907-08 (quoting Tr. of Jan 20, 2011 hr'g at 4-6).

The debtor in *Ingram* filed a motion for reconsideration, in which he asserted that the credit counseling agency "led him to believe he had completed the course with the internet session and that the follow-up session by phone was 'just for the certificate.'" *Id.* at 908. The Bankruptcy Court denied the motion for reconsideration and found that, even if the credit counseling agency caused the debtor to believe he had timely completed Credit Counseling, "that would not change the Debtor's failure to comply with 11 U.S.C. § 109(h)." *Id.*

The B.A.P. affirmed the dismissal of the debtor's bankruptcy case and stated:

> The requirements of § 109(h) are clear and unambiguous. As such, the bankruptcy court, except in the limited circumstances set forth in § 109(h)(2), (3), and (4) which were not present here, did not have discretion to ignore, modify, or defer the requirements of § 109(h)(1). Compliance with § 109(h) is a prerequisite to obtaining relief under the Bankruptcy Code. By definition, an individual may not be a debtor who is eligible for bankruptcy relief unless he has complied with § 109(h).

Id. at 910.

In the present case, the Debtor asserts that exigent circumstances exist — *i.e.*, confusion concerning the completion of Credit Counseling — which warrant a waiver, pursuant to § 109(h)(3)(A), of the requirement that Credit Counseling be completed during the 180-day period ending on the Petition Date. However, § 109(h)(3)(A)(ii) mandates that the Debtor "requested credit counseling services . . . but was unable to obtain the services . . . during the 7-day period beginning on the date on which the debtor made that request[.]" 11 U.S.C. § 109(h)(3). Nothing in the record indicates that the Debtor was unable to obtain Credit Counseling despite requesting such services. Instead, the Debtor simply failed to fully complete Credit Counseling prior to filing his petition, much like the debtor in *Ingram*. As a consequence, the Court finds that the Debtor does not qualify for the exigent circumstances exception contained in § 109(h)(3)(A).

As explained by the Bankruptcy Court and the B.A.P. in *Ingram*, full compliance with § 109(h) is a prerequisite to being a debtor.

Because the Debtor did not complete Credit Counseling prior to filing his petition and has not demonstrated exigent circumstances, the Court finds that the Debtor is ineligible for bankruptcy relief. Accordingly, the Court hereby (i) denies the Motion; and (ii) dismisses the Debtor's bankruptcy case.

IT IS SO ORDERED.

Kay Woods

KAY WOODS
UNITED STATES BANKRUPTCY JUDGE